

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

75-4105

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

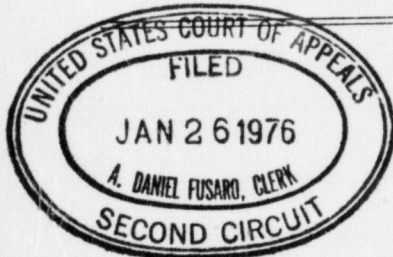
75-4105
Docket Nos. 75-4113
75-4118

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,
Petitioners and Intervenor,
against

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,
TRT TELECOMMUNICATIONS CORP.,
Intervenor.

PETITIONS FOR REVIEW OF A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

**BRIEF OF PETITIONER AND INTERVENOR,
ITT WORLD COMMUNICATIONS INC.**



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**BRIEF OF PETITIONER AND INTERVENOR
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Preliminary Statement

This is a consolidated proceeding seeking review, pursuant to 47 U.S.C. §402(a), of a Memorandum Opinion and Order (the "Order") of the Federal Communications Commission ("FCC") released June 6, 1975,* in which the FCC improperly refused to reject as unlawful certain tariff revisions filed with the FCC by TRT Telecommunications Corporation ("TRT").

* A copy of the Order appears in the Joint Appendix ("J.A.") at pp. A-1 through A-9.

Statement of Issue

The issue presented by the Petition for Review is whether TRT's revised tariff, which determines the applicability of a so-called "off-peak hour" discount for international telex calls on the basis of Eastern time even if a customer is actually located in a different time zone, gives undue and unreasonable preference and advantage to telex customers located outside the Eastern time zone, and subjects businesses within the Eastern time zone to undue and unreasonable prejudice and disadvantage, all in violation of Section 202(a) of the Communications Act, by enabling Western businessmen, but not their Eastern competitors, to avail themselves of the lower off-peak rates during a portion of their normal business day.

Statement of Facts

ITT Worldcom, TRT, RCA Global Communications ("RCA Global") and Western Union International ("WUI") are the four principal common carriers of international record (*i.e.*, non-voice) communications. These four international record carriers ("IRCs") transmit and receive international data communications, including international telex messages, on behalf of customers located throughout the United States. Pursuant to the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* (the "Communications Act"), the rates charged by the IRCs are set forth in tariffs filed with the FCC and are subject to regulation by that agency.*

The proceedings below. On March 24, 1975, TRT filed with the FCC certain revisions to its tariff for international telex service. TRT proposed to offer reduced rates for telex transmissions from the continental United States to the United Kingdom ("UK") and to the Federal Republic

* See in particular §§201-205 of the Act, 47 U.S.C. §§201-205.

of Germany ("FRG"). The reduced rates were to be applicable only during so called "off peak" periods, *i.e.*, during the night, the early morning, or the weekend, as determined by Eastern Standard Time or Eastern Daylight Time.* The rate revisions were to be effective for an experimental period of six months. (J.A. A-10, A-11)

Because TRT's off-peak rates were to be offered on the basis of Eastern time regardless of a customer's location within the United States, businessmen in parts of the country outside the Eastern time zone would be able to obtain the benefits of the reduced rates during the latter part of their normal business day, or immediately thereafter. By offering its off-hour rates to all customers beginning at 7:00 PM Eastern time, TRT made it possible for users in the Central Time Zone to obtain reduced rates after 6:00 PM local time; Mountain Zone users had their rates reduced after 5:00 PM local time; and, since 7:00 PM Eastern time is only 4:00 PM in the Pacific Time Zone, West Coast users could enjoy the lower rates as early as 4:00 PM local time. Thus the tariff structure which TRT proposed discriminated against **East Coast businessmen** who could obtain the lower rates only by incurring the expense and inconvenience of keeping their offices open after their usual business hours to transmit their messages, and in favor of their Western rivals, who received the benefits of the lower rates during the afternoon of their normal business day.

Because the rate structure proposed by TRT discriminated in favor of Western businessmen for whose business

* TRT's tariff revisions provided in relevant part (J.A. A-15):
Weekend and Night Telex Calls

In the case of telex calls to [the UK or the FRG], a reduced charge of \$2.00 per minute applies to calls connected as defined herein, between the hours of 7 p.m. and 9 a.m. EST or EDT Monday through Thursday and from 7 p.m. EST or EDT Friday through 9 a.m. EST or EDT Monday.

they and TRT competed, ITT Worldcom, RCA Global, and WUI filed petitions with the FCC asking that TRT's tariff revisions be rejected or that their effectiveness be suspended pending investigation.* (J.A. A-37, A-108) On May 2, 1975, TRT's revisions were suspended by the FCC for 30 days, ostensibly to allow the FCC additional time to decide the issues raised by the other three IRCs.** (J.A. A-153, A-134) However, the FCC took no further action during the suspension period and on June 2, 1975, the new TRT rate structure became effective by operation of law.

The four IRCs compete for the patronage of international telex users, and when it became apparent that the FCC would not act to prevent TRT's tariff revisions from becoming effective, ITT Worldcom, RCA Global, and WUI were forced by competitive necessity to match TRT's new lower rates. On May 30, 1975, ITT Worldcom filed with the FCC tariff revisions identical to those proposed by TRT. Similar filings were also made on that date by RCA Global and WUI. (J.A. A-135, A-139)

The Communications Act provides that tariff revisions cannot become effective on less than 30 days' notice without the FCC's permission.*** Since their matching tariffs

* Section 202(a) of the Communications Act, 47 U.S.C. §202(a), makes discriminatory tariffs unlawful. The text of that Section is reproduced in full at p. 11, *infra*.

** Section 204 of the Act, 47 U.S.C. §204, permits the FCC to suspend the effectiveness of rate filings for up to 90 days, to permit investigation of the lawfulness of the proposed rates.

*** Section 203(b) of the Communication Act, 47 U.S.C. §203(b), provides:

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

were filed just prior to the effectiveness of TRT's off-peak rates, the other IRCs faced the prospect of operating at a competitive disadvantage for nearly a month if they were forced to wait until the end of the statutory notice period before putting their tariff revisions into effect. To prevent this, each of these three IRCs requested permission from the FCC to begin matching the new TRT tariffs on a single day's notice. (*Ibid.*)

In the past, the FCC had routinely granted applications to reduce tariff rates on less than statutory notice, when such action was necessary to permit a carrier to remain competitive by matching an existing rate structure.* However, on the same day ITT Worldcom filed its matching tariff, it was orally advised by the FCC that its application to put that tariff into effect on less than statutory notice had been denied.** Subsequently, on June 3, 4, and 5, 1975, ITT Worldcom urgently requested that the FCC reconsider its refusal to permit ITT Worldcom to match TRT's tariff reductions.*** These requests were unavailing. By letter dated June 2, 1975, TRT urged the FCC to reject the applications made by ITT Worldcom and the other IRCs for permission to put their matching tariffs into effect; this opposition was filed even though the IRCs' asked no more than to be allowed to charge rates identical to those TRT had already put into effect.****

* See the Reply Affidavit of John O'Boyle, submitted in support of ITT Worldcom's motion for interim relief.

** The similar applications of RCA Global and WUI were likewise rejected.

*** Affidavit of Joseph J. Jacobs, submitted in support of ITT Worldcom's motion for interim relief, at p. 8.

**** TRT further requested that the effectiveness of the other IRCs' matching tariffs be suspended by the FCC beyond the statutory notice period.

Thus, ITT Worldcom found itself in an untenable competitive situation. TRT's new reduced rates had become effective, but ITT Worldcom could not lawfully offer its customers the same rates because the FCC had refused to allow ITT Worldcom's matching tariff to go into effect. ITT Worldcom was forced to ask this Court for relief from the competitive injury it was suffering as the result of the unwarranted preferential treatment which the FCC had accorded TRT.*

Prior proceedings in this Court. On June 5, 1975, ITT Worldcom filed its Petition for Review with this Court. ITT Worldcom asked the Court to reverse both the FCC's refusal to reject the discriminatory TRT tariff structure and the FCC's denial of ITT Worldcom's request to meet that tariff on less than statutory notice. Since the competitive advantage which the FCC had given TRT through these two decisions was threatening ITT Worldcom with a loss of customers and other irreparable harm, ITT Worldcom moved this Court to grant it interim relief, either by

* There was clearly no reasonable basis for the FCC's refusal to permit ITT Worldcom and the other IRCs to match the TRT tariffs. TRT proposed its tariff as an experiment to determine whether lower rates during off-peak hours would result in both a more efficient use of the international telex network as existing customers shifted the timing of their messages to take advantage of the off-peak rates, and a greater utilization of telex capacity as the reduced rates induced new customers to transmit their international messages via telex. Obviously, such an experiment cannot produce meaningful results unless all IRCs participate. If TRT alone offered the reductions in rates, it would be impossible to determine the extent to which any changes in TRT's traffic pattern were due to a shift of customers from the other IRCs to TRT in response to TRT's lower rates. As a result, the experimental data could not be used to predict what the effect of the experimental rates would be on a permanent basis, when the other IRCs' matching tariffs would also be in effect. See *RCA Global Communications, Inc.*, 30 F.C.C. 2d 817, 819 (1971), an analogous case in which the FCC recognized that it must have the operational experience of all the IRCs before it can make a meaningful policy determination as to whether an experimental tariff should be continued permanently.

staying the effectiveness of TRT's tariff or by permitting ITT Worldcom to put its matching tariff into effect immediately, pending plenary review by the Court.*

The following day, June 6, 1975, the FCC issued its Order, which formally rejected the challenge ITT Worldcom and the other IRCs made to the TRT tariff revisions. On the issue of the discriminatory effect of the tariff, the FCC referred in a brief paragraph to the experimental nature of the tariff and TRT's claim that it would be burdensome and unduly expensive to reprogram its billing computer for a six month experimental period.** The FCC observed that it "would require further justification in the case of any proposal to depart from the use of local transmission times for a permanent service offering"*** After rejecting the other arguments submitted in opposition to TRT's tariff proposals,**** the FCC not only authorized TRT to offer off-peak discounts on the basis of Eastern time, but also ordered TRT to conduct a similar experiment

*RCA Global and WUI moved to intervene in support of ITT Worldcom and asked the Court for the same interim relief ITT Worldcom sought. TRT intervened in support of the FCC and opposed ITT Worldcom's motion for interim relief. RCA Global and WUI each individually filed its own Petition for Review with the Court. RCA Global's Petition (Docket No. 75-4113) was filed on June 12, 1975; WUI's Petition (Docket No. 75-4118) on June 17, 1975. Subsequently the three remaining IRCs' were granted leave to intervene in the actions commenced by both these Petitions, and further proceedings were consolidated by stipulation with the proceeding brought by ITT Worldcom.

**Order, p. 7 (J.A. A-7).

****Id.*

****The IRCs asserted that the unilateral introduction of off-peak discounts for international services by an American carrier was inconsistent with the FCC's policy that such changes in tariff structures should be adopted only after consultations with European carriers and their regulatory agencies. They further asserted that the text of the TRT tariff revisions was ambiguous, and that the revisions had been filed without sufficient supporting economic data and other explanatory material, as required by Sections 61.38 and 61.55(f) of the FCC's rules, 47 C.F.R. §§61.38 and 61.55(f).

with reduced telex rates for telex transmissions originated in the U.S. during hours which were "off-peak" in Europe. (J.A. A-9) The FCC's Order did not deal with the requests of ITT Worldcom, WUI, and RCA Global to match TRT's tariff reductions on less than statutory notice. To bring the FCC's June 6th Order before the Court, ITT Worldcom filed its First Amended Petition for Review on June 10, 1975.

Oral arguments on ITT Worldcom's motion for interim relief were heard by this Court on June 17, 1975, before a panel composed of Judges Gurfein and Meskill of this Circuit and Judge Gibbons of the Third Circuit, sitting by designation.* At the time of the argument, the matching tariffs of ITT Worldcom, RCA Global, and WUI were scheduled to become effective in slightly more than two weeks, at the expiration of the statutory notice period, unless the FCC exercised its power under Section 204 of the Communications Act to suspend them for a further period of up to ninety days.** During oral argument, the Court required the FCC to report to it promptly the disposition it made of TRT's request that the matching tariffs be suspended beyond the statutory notice period. The Court thereafter decided, in a *per curiam* opinion, that since the FCC's failure to suspend the matching tariffs would render the motion for interim relief moot, and since a suspension of those tariffs would not leave the IRCs without judicial remedy, it would deny ITT Worldcom's motion "without prejudice to the rights of the parties to seek petitions for

*The oral argument had been adjourned until that date on June 10, 1975.

By letters dated June 16, 1975, ITT Worldcom, WUI, and RCA Global were formally advised that the FCC's Common Carrier Bureau, acting pursuant to authority delegated to it by the Commission, had rejected those carriers' requests to match TRT's tariffs on less than statutory notice.

See footnote *, page 4, *supra*.

review for any final order of the Commission or to make such further applications as may be proper.”*

By an order adopted June 24, 1975, the FCC rejected TRT's request that the other IRCs' matching tariffs be suspended beyond the statutory notice period (J.A. 153). The matching tariffs thereafter became effective by operation of law. Thus, the question of whether the FCC erred in refusing to allow the three IRCs to match TRT's rates on less than statutory notice has become moot, as the Court foresaw in its *per curiam* opinion denying interim relief.** However, the other issue raised by ITT Worldcom's Petition for Review, whether the TRT tariff structure is discriminatory and unlawful, is still before the Court, and is now ripe for decision.

ITT Worldcom's Petition for Review and the similar Petitions for Review brought by RCA Global and WUI were consolidated by stipulation of all the parties. As part of their stipulation, September 15, 1975 was fixed as the date by which the three petitioners would file and serve their briefs.

On September 4, 1975, ITT Worldcom moved the Court to extend the time of the petitioners to submit their briefs until December 15, 1975. ITT Worldcom sought this extension of time because TRT's experimental rates were scheduled to expire on November 30, 1975. Thus even if ITT Worldcom and the other petitioners had submitted their briefs on September 15, respondents' briefs and petitioners' reply briefs would not have been filed in time to allow the

* The Court also denied the FCC's motion to dismiss ITT Worldcom's Petition to Review for lack of jurisdiction.

** In admitting that this branch of its Petition for Review has become moot, ITT Worldcom does not concede that the FCC acted properly. To the contrary, there is no justification for the favoritism the FCC showed TRT, since the effect of its discrimination in favor of TRT was to undercut the validity of the experiment it had purportedly found desirable. See footnote *, p. 6, *supra*.

Court to decide the lawfulness of TRT's tariff revisions before their scheduled expiration date. If TRT did not seek to extend the effectiveness of the off-peak discounts, or if the FCC conditioned its approval of future off-peak discounts on the use of local time rather than Eastern time to determine the off-peak period, the question of whether TRT's tariffs were discriminatory would become moot before the Court could decide it. ITT Worldcom's motion to defer petitioners' briefs was granted on the consent of all parties.

On October 31, 1975, TRT requested that the FCC extend the effectiveness of its off-peak rates for an additional three months. ITT Worldcom, WUI and RCA Global all opposed any extension of the experimental period.* However, on November 26, 1975, the FCC approved an extension of the experiment for an additional two months, or until January 31, 1976. The FCC did not require the elimination of the discriminatory aspects of the off-peak rate reductions, and the availability of the reduced rates continues to be determined by reference to Eastern time rather than a customer's local time.

Thus, the FCC has once again failed to stop the discrimination which international telex users located in the East

* By letter dated October 29, 1975, from ITT Worldcom's John O'Boyle to Ruth V. Reel of the FCC, ITT Worldcom presented convincing proof that the experimental rate structure had been a complete failure. A detailed analysis of ITT Worldcom's experience since it put off-peak rates into effect demonstrated that there has been no noticeable change in the distribution of telex traffic. There is no evidence of any shift in the timing of customer messages to take advantage of the lower rates during peak periods; nor is there any indication that new users have been attracted to telex service by the availability of lower rates. The only effect of the experimental tariff structure has been to enable West Coast businessmen, and others who have traditionally transmitted their telex messages during periods which are "off peak" in the Eastern Time Zone, to enjoy a windfall reduction in rates without changing their habitual pattern of telex use. Thus, in actual practice, TRT's off peak rates have had the discriminatory impact ITT Worldcom predicted, without producing any of the benefits TRT claimed would occur.

have now suffered since June 1, 1975, and ITT Worldcom's expectations that the discrimination would end with the expiration of the six month experimental period have been disappointed. Rather than correcting the discriminatory structure of TRT's off-peak tariff and thereby obviating the need for further proceedings in this Court, the FCC has allowed the discrimination to continue unabated for at least another two months. ITT Worldcom has therefore concluded that the issue of discrimination raised by TRT's tariff must now be addressed by this Court, or the discriminatory features incorporated in TRT's "experimental" tariff may become permanent, for all practical purposes, through subsequent extensions of the experimental period.* Accordingly, ITT Worldcom submits this brief in support of its Petition for Review.

ARGUMENT

POINT I

The TRT Off-Peak Discounts are Discriminatory and Unlawful, and the FCC Committed Reversible Error When It Failed to Reject TRT's Tariff Filing.

Section 202(a) of the Communications Act condemns discriminatory behavior by communications carriers in the following terms:

“(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or

* Cf., *ABC Air Freight Company v. C.A.B.*, 391 F.2d 295, 300 n. 5 (2d Cir. 1968).

unreasonable preference or advantage to any particular person, class of persons, or locality,* or to subject any particular person, class of persons or locality to any undue or unreasonable prejudice or disadvantage."

As the District of Columbia Court of Appeals has said, the prohibition against discrimination contained in Section 202(a) is categorical and admits of no exceptions:

"The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with 'any'. It is made unlawful for 'any' carrier to make 'any' unjust discrimination by 'any' means, or to make 'any' undue preference to 'any' particular person, or to subject 'any' person to 'any' undue prejudice. Moreover, it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy. The money difference in price is the core of the proscription. Equal prices for like services is in itself a matter of public interest." *American Trucking Association, Inc. v. F.C.C.*, 377 F.2d 121, 130 (D.C. Cir. 1966), *cert denied*, 386 U.S. 943 (1967).**

TRT's method of determining the availability of off-peak discounts is unarguably discriminatory and cannot be sustained in the face of the absolute condemnation of discrimination found in Section 202(a)

Clearly, TRT's tariff results in "different charges to different customers for like services under like circumstances." An East Coast businessman who wishes to place

* The reference to "locality" makes clear that distinctions between customers at two different geographic locations cannot, on that ground alone, be considered "reasonable," "just" or "due."

** See also *Copley Press, Inc. v. F.C.C.*, 444 F.2d 984, 988-89 (D.C. Cir. 1971).

a telex call to the UK or the FRG at any time during his normal business day must pay the full tariff rate. Yet his West Coast competitor may make the same call to the same foreign customer during the latter part of his usual business hours and pay a substantially lower toll* as the result of the difference of time zones and the arbitrary use of Eastern time to determine the availability of TRT's discounts. West Coast businesses necessarily obtain a competitive advantage over their East Coast rivals from the windfall rate reductions they enjoy as the result of TRT's discriminatory rate structure.

TRT's discriminatory tariff is not made any more lawful by the fact that TRT makes its discounts available to East Coast users after the close of their normal business day. The availability in the East of lower rates during inconvenient periods of the day is no substitute for the West Coast businessmen's privilege of obtaining discount rates without altering his normal hours of operation. Obviously, lower rates become much less attractive after the close of business hours, since a businessman cannot take advantage of discounts which are only available after his normal closing time unless he is willing to incur the additional operating expenses, such as overtime pay for employees, which are necessary to keep his offices open to send his telex messages. Thus, East Coast businessmen will pay more, directly or indirectly, for international telex services than their West Coast competitors. The East Coast user must either transmit his telex messages during his normal business day, when the higher rates are in effect, or send his message during the "off-peak" period, when the telex rates themselves are lower but when the savings in rates will be

* The discounts offered by TRT are substantial. The regular charge for international telex service is \$2.55 per minute. During off-peak hours, TRT's tariff provides a rate of only \$2.00 per minute, a discount of approximately 22%.

offset in whole or in part by the additional expenses he must bear to keep his office open after its ordinary business hours.* In either case, his total expenditure will necessarily be greater than that of his West Coast competitor, who can obtain the substantial savings in rates offered by TRT without incurring any additional expense, merely by sending his telex messages during the latter part of his usual business day. The TRT tariff therefore has an inherently discriminatory impact, and cannot be sustained by this Court.**

The FCC's Order contains no convincing justification for permitting TRT to discriminate against Eastern telex users. The entire discussion of the discriminatory effect of the use of Eastern time to determine the off peak period appears in a single, cryptic paragraph of the FCC's Order which reads as follows:

"With respect to the claim of discrimination in the use of the Eastern time zone as the yardstick for off-peak hours, we conclude that this is reasonable for

* Indeed, the added expense of keeping a business operating into the night may well exceed the savings offered by the off-peak rates. This may explain why ITT Worldcom's experience has shown that customers have not shifted the timing of their telex messages to take advantage of the off-peak discounts.

** TRT's arbitrary use of Eastern time to govern the availability of off-peak discounts, regardless of the customer's local time, is totally unprecedented, to the best of ITT Worldcom's information and belief. Off-peak discounts for long distance telephone calls, with which the Court is familiar, are based on the local time of the party initiating the call. See American Telephone and Telegraph Company Tariff FCC No. 263 §3. (c)(4)(A), 7th Revised Page 27:

"(4) Timing of messages.

(A) The time when connection is established, as provided in (b) through (e) in below, determined in accordance with the time-standard or daylight saving-observed at the location of the rate center of the calling station, determines whether day, evening or night and weekend rates apply."

the purposes of the experiment in view of TRT's representation as to its traffic patterns. TRT states that 84% or more of its telex traffic to U.K. and FRG is transmitted between 9 a.m. and 7 p.m. weekdays, Eastern time. While we do not think it worthwhile in the circumstances to require TRT to reprogram its billing computer for a six month experiment, we would require further justification in the case of any proposal to depart from the use of local transmission times for a permanent service offering."

At first blush, the FCC appears to be justifying the discrimination solely in terms of TRT's interest in engaging in it; that is, the first two sentences of the paragraph suggest that the discriminatory use of a definition of peak hours in terms of Eastern time is permissible because that is when TRT's peak hours occur.* The fact that businesses in other time zones have peak hours at other times is totally ignored. Obviously, discriminatory tariffs cannot be justified solely by reference to the interest of the person engaging in the discrimination; some attention must be paid to the interests of the victim of discrimination. In the last sentence of the paragraph, the FCC appears to acknowledge by its reference to "local transmission times" that other

* Even if TRT's discriminatory rates could be justified solely because they served TRT's interest in eliminating traffic congestion during its peak hours, the FCC should have considered whether the nondiscriminatory alternative of offering off-peak discounts on the basis of local rather than Eastern time would have accomplished the same result. Obviously, a more detailed examination of TRT's traffic patterns would be necessary to resolve this question. For example, the FCC should have at least examined whether different areas of the country have peak hours after 7:00 P.M. Eastern time as the result of differences in time zones. If West Coast users are already placing most of their calls during TRT's off peak period, there is no need to reduce rates to shift their traffic patterns, and TRT's tariff reduction is no more than a discriminatory windfall for continuing existing habits. The foregoing is merely one example of the complexity of the analysis which should have been performed to determine the probable impact of TRT's tariff proposal.

interests exist—those of the disadvantaged East coast customers—which will be affected by the discrimination and that these effects would have to be considered if this were not “a six month experiment.” However, whether the FCC has given any consideration at all to these interests in the present case is, at best, a question which cannot be resolved by reading the FCC’s Order. For that reason alone, the Order should be reversed:

“We must know what a decision means before the duty becomes ours to say whether it is right or wrong.”

United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935); see also, *Secretary of Agriculture v. United States*, 347 U.S. 645, 654 (1954); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *ABC Air Freight Company v. C.A.B.* 391 F.2d 295 (2d Cir. 1968).

Even if the FCC’s conclusory assertion that “we do not think it worthwhile in the circumstances to require TRT to reprogram its billing computer” could be read as finding or conclusion that the interests of TRT in using an Eastern time definition of peak hour outweighed the interests of its customers in a local time definition, the opinion would be inadequate. Section 8(b) of the Administration Procedure Act, 5 U.S.C. § 557(c), provides:

“All decisions . . . shall include a statement of—

“(A) finding and conclusions, and the reasons or basis therefor, . . .”

Here, one is "left to guess as to the agency's findings or reasons"* for concluding that reprogramming of TRT's billing computer to handle local times is not "worthwhile" or for rejecting other alternatives for reconciling TRT's interests with those of its customers.** Nor is it "so 'obvious' as to remove the need for explanation"*** why it is more important to relieve TRT of peak hour traffic congestion than to provide equal treatment to telex customers in each of the United States' time zones.

Indeed, what finally becomes evident from an examination of the FCC's ambiguous discussion of the problem is that the FCC has not taken a "hard look"**** at the discriminatory impact of the TRT tariff. Apparently, the FCC has not made a well considered attempt to resolve the competing claims of TRT and its East Coast customers but has simply decided that a resolution of those conflicting claims is not required because TRT has proposed an experiment of limited duration. The fallacy of this approach is the subject of Point II below.

* See *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); and *Radio Station KFH Co. v. F.C.C.*, 247 F.2d 570 (D.C. Cir. 1957).

** One such alternative would be to decrease the off-peak discount sufficiently to permit TRT to recover the cost of reprogramming for local times. In this connection, it should be noted that TRT was willing to reprogram its computer to the extent necessary to deal with dual rates and Eastern Standard Time and took into account such costs in fixing its off-peak discount. See Exhibit A to the Affidavit of Joseph Jacobs at p. 17.

*** *Melody Music, Inc., v. F.C.C.*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

**** *Greater Boston Television v. F.C.C.*, *supra*, 444 F.2d at 851.

POINT II

The FCC Applied an Erroneous Standard of Law to Determine the Legality of TRT's Tariff Revisions and the FCC's Order Must Therefore Be Reversed and Remanded.

In its Order, the FCC did not adequately address the question of whether TRT's tariff revisions were discriminatory and unlawful. Faced with the undeniable fact that East Coast users would pay more for telex service than West Coast users, the FCC was understandably unwilling to hold that TRT's proposed tariff revisions were non-discriminatory. To the contrary, the FCC seems to have recognized that, at the least, a serious issue of discrimination was presented by TRT's use of Eastern time rather than local time to calculate its off-peak discounts. However, the FCC placed heavy emphasis on the experimental nature of the tariff, and stated that although it would have required a greater justification for departing from the use of local time if TRT had proposed a permanent tariff revision, it would permit TRT to utilize Eastern time during the experiment.*

One thing, at least, is clear from the Order. The FCC held that a less rigorous legal standard applies to determine the lawfulness of a tariff which is denominated experimental rather than permanent. In so holding, the FCC committed reversible error, for the absolute prohibition of discrimination contained in the Communications Act is equally applicable to both experimental and permanent tariffs. Wholly apart from the question of whether TRT's tariffs are, as ITT Worldcom contends, discriminatory

*"While we do not think it worthwhile in the circumstances to require TRT to reprogram its billing computer for a six month experiment, we would require further justification in the case of any proposal to depart from the use of local transmission times for a permanent service offering." Order, p. 7. (J.A. A-7).

and unlawful, the FCC's Order must therefore be reversed, on the well established grounds that an administrative decision cannot be sustained if it is based on an erroneous conception of the applicable rule of law.*

The FCC's reliance on the experimental aspects of the TRT tariff is misplaced. The condemnation of discriminatory tariffs contained in Section 202(a) is absolute, and there is no statutory authorization anywhere in the Communications Acts which permits discrimination simply because it is denominated experimental or limited in duration.** The FCC itself has previously recognized that the

* *S.E.C. v. Chenery Corp.* 318 U.S. 80 (1943), See also *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974); *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20 (1951); Friendly, "Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders," 1969 *Duke L.J.* 199, 222-223.

** The failure of the Communication Act to include special standards of legality for experimental tariffs was not mere oversight, for Congress provided, in Section 303(g) of the Act, 47 U.S.C. § 303(g), for the FCC's use of experiments to:

"Study new uses of radio provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Section 303(g) is part of the FCC's authority to regulate radio broadcasting, and is not applicable to its regulation of common carriers. Obviously, while the question of experimentation by the FCC was before it, Congress could have authorized the FCC to approve, on an experimental basis, common carrier tariffs which would otherwise be unlawful under the Act. It did not do so, and therefore it appears that Congress intended experimental tariffs to be treated no differently than permanent tariffs.

It should be noted that TRT has conducted its experiment with off-peak rates in a way which would not pass muster under the public-interests standards developed by the FCC and the courts to regulate experiments attempted under Section 303(g). The FCC, by rule, 47 C.F.R. §§ 74.382(b) and 74.182, has forbidden charging the public for an experiment, to prevent experimenters from profiting from their experiments at the public's expense. Similarly, the Courts have carefully scrutinized the *bona fides* of experiments, to guard against the misuse of an experiment to promote the experimenter's business

absolute statutory prohibition of discrimination is fully applicable to experimental tariffs, when it considered an experimental Comsat rate available only for traffic to Hawaii:

"The Commission has stated flatly that 'different charges to different users for similar service are prima facie unlawful.' The Commission is of the view that experimental rate offerings, properly structured, may well be in the public interest. However, this does not relieve [a carrier] from complying with the requirements of the Communications Act or the Commission's Rules and Regulations." *Communications Satellite Corp.*, 35 F.C.C. 2d 908, 912 (1972) [citations omitted].

The wisdom of the FCC's approach in *Comsat*, *supra*, is readily apparent. It makes no difference to a victim of discrimination whether the tariff which gives preferential treatment to his business rival is labelled permanent or experimental; the injury to the disfavored customer is the same in either event. Certainly, the FCC cannot evade the Communications Act's absolute prohibition against discrimination by the simple expedient of calling a tariff an experiment rather than a permanent rate. Permitting discrimination in the guise of experimentation would vitiate the statutory prohibition against discrimination, as this case aptly illustrates. The FCC has already extended the experimental period once without rectifying the discrimina-

or to injure his competitors. See, *Capital Broadcasting Co. v. F.C.C.*, 257 F.2d, 630, 632 (D.C. Cir. 1958). In the instant case, TRT has vigorously advertised its experimental rates—including the fact that they are based on Eastern rather than local time—in an attempt to divert business from the other IRCs and profit from the experiment at their expense. See Exhibits A and B to the Reply Affidavit of Harry Schwedock, submitted in support of ITT Worldcom's motion for interim relief. Such conduct goes beyond the proper scope of an experiment which purportedly is being conducted in the public interest.

tory nature of TRT's tariff, and there is nothing to prevent it from extending it again in the future. Experiments have a way of becoming permanent, and therefore the absolute rule against discrimination must be applied with full force to TRT's experiment.*

Since the FCC failed to realize that the antidiscriminatory prohibitions of the Communications Act are fully applicable to experimental tariffs, the test it applied to determine the lawfulness of TRT's tariff was overly generous to TRT. The FCC's Order must therefore be reversed and remanded, on the grounds that the FCC applied the wrong standard of law.

CONCLUSION

For the reasons set forth above, ITT World Communications Inc. respectfully requests that the Order of the Federal Communications Commission, released June 6, 1975, be reversed.

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Respectfully submitted,

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* *ABC Air Freight Company v. C.A.B., supra.*